

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SIMPSON EUGENE RUCKER,

Defendant-Appellant.

UNPUBLISHED

June 20, 2006

No. 261730

Wayne Circuit Court

LC No. 04-010158-01

Before: Davis, P.J., and Sawyer and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of breaking and entering a motor vehicle, MCL 750.356(3), and attempted unlawful driving away a motor vehicle, MCL 750.92; MCL 750.413. We affirm.

Defendant argues that he was denied due process of law because the police destroyed the screwdriver that was found in his pocket at the time of his arrest. Because this claim was not raised below, we review this issue for plain error affecting defendant's substantial rights. *People v Green*, 260 Mich App 392, 396; 677 NW2d 363 (2004). Defendant has not shown plain error affecting his substantial rights with regard to this issue.

The mere routine destruction of evidence by the police does not require reversal where the purpose is not to destroy evidence for a forthcoming trial. *People v Johnson*, 197 Mich App 362, 365; 494 NW2d 873 (1992). Rather, the defendant bears the burden of showing that the evidence lost was exculpatory or that the police acted in bad faith. *Id.* It is not plain that the screwdriver was exculpatory evidence. To the contrary, it seems apparent that the screwdriver was inculpatory evidence because it was found on defendant's person when he was arrested, and is an item that would commonly be used when attempting to break into or steal a car.

Similarly, it is not plain that there was any bad faith by the police in destroying the screwdriver. The screwdriver seized from defendant was put into the property room at the police station for safekeeping until trial. A police investigator testified that it was originally noted that the screwdriver needed to be preserved until a specific trial date, but that when the trial was adjourned those notes did not get changed, and the screwdriver was destroyed. It appears that the screwdriver was inadvertently destroyed by police officers who did not realize it should have been preserved for trial. Defendant has not shown plain error affecting his substantial rights with regard to his claim that the destruction of the screwdriver violated his due process rights.

Defendant also argues that his trial counsel provided ineffective assistance by failing to vigorously cross-examine Marshelia McNair and Derrick Turner and, to an extent, Sergeant Campau, regarding their identification of him. We disagree.

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that this prejudiced the defendant. *People v Kimble*, 470 Mich 305, 314; 684 NW2d 669 (2004). There is a strong presumption that counsel's performance was sound trial strategy. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

Trial counsel elicited from McNair on cross-examination that the man she saw by her car was about six feet away from her when she saw him, and that some street lights in the area may have been out at the time. Similarly, trial counsel elicited on cross-examination of Turner that not every street light was on, that he saw the person in the car from the threshold of the apartment building, and that the light in the car was not set to illuminate when its doors were open. Trial counsel also elicited an acknowledgment from Turner that he testified at the preliminary examination that he could not see the face of the person in the car.

Defendant essentially faults trial counsel for not asking McNair and Turner if their view of the man they saw in or near McNair's car was full face or profile, or about "the complexion, height, hair style, possible scars, or other facial features of the suspect." But answers to such questions could well have served to reinforce the credibility of McNair's and Turner's identification of defendant by being consistent with his actual appearance. Thus, it appears to have been a reasonable strategic choice by trial counsel to focus on highlighting the distance between McNair and Turner and the man in or near McNair's car and the relative darkness at the time, as well as Turner's earlier testimony that he could not see the man's face, in order to call into question their identifications of defendant rather than asking them further questions about the characteristics of the man they saw.

Defendant also indicates that there were no questions to the "arresting officers" as to the identifications they were given by McNair and Turner. In fact, only one arresting officer testified at trial, Sergeant Campau. He testified that McNair and Turner directly pointed out defendant to him. Trial counsel could reasonably have determined that cross-examination of Campau regarding that identification would have been undesirable because it would have emphasized to the jury the quick identification of defendant by McNair and Turner to a police officer at the time of the incident.

Defendant has not established a claim of ineffective assistance of counsel because he has not shown that trial counsel's handling of cross-examination fell below an objective standard of reasonableness as opposed to being in the realm of reasonable trial strategy.

Affirmed.

/s/ Alton T. Davis
/s/ David H. Sawyer
/s/ Bill Schuette